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No. 85-2067 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, *Petitioner*

v.

JOSE MENDOZA-LOPEZ AND
ANGEL LANDEROS-QUINONES

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

Whether a deportation order, which has not been subjected previously to judicial review, can be collaterally attacked in a 8 U.S.C. 1326 prosecution for the purpose of determining whether the order was entered in accordance with due process and was supported by substantial evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 781 F.2d 111. The opinion of the district court (Pet. App. 8a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1985. A petition for rehearing was denied on March 18, 1986 (Pet. App. 29a). On May 6, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to June 16, 1986. The petition for a writ of certiorari was filed on that date; the brief in opposition was filed on August 13, 1986. Writ of certiorari was granted on October 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

U.S. Const., amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

8 U.S.C. (1946 ed.) § 180 provided:

> **§ 180. Reentry or attempted reentry of deported alien; penalty; deported seamen as entitled to landing privileges**

(a) If any alien has been arrested and deported in pursuance of law, he shall be excluded from admission to the United States whether such deportation took place before or after March 4, 1929, and if he enters or attempts to enter the United States after the expiration of sixty days after said date, he shall be guilty of a felony and upon conviction thereof shall, unless a different penalty is otherwise expressly provided by law, be punished by imprisonment for not more than two years or by a fine of not more than $1,000 or by both such fine and imprisonment; *Provided*, That this section and sections 136, 154 and 180a-180d of this title shall not apply to any alien arrested and deported before March 4, 1929, in pursuance of law, in whose case prior to his reembarkation at a place outside the United States, or his application in foreign contiguous territory for admission to the United States, and prior to March 4, 1929, the Attorney General has granted such alien permission to reapply for admission.

(b) For the purposes of this section any alien ordered deported (whether before or after March 4, 1929) who has left the United States shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed. . . .

8 U.S.C. § 1326 provides:

Any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for

admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment of not more than two years, or by fine of not more than $1,000, or both.

8 U.S.C. § 1105a provides in pertinent part:

(a) * * * The procedure prescribed by, and all the provisions of chapter 158 of title 28 [review of orders of federal agencies] shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title [proceedings to determine deportability] or comparable provisions of any prior Act, except that—

* * * * *

(6) * * * if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 1252 of this title [supervision of deportable alien and penalty for willful failure to depart] only by separate motion for judicial review before trial * * *.

* * * * *

(9) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

* * * * *

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.

STATEMENT

1. Both respondents were apprehended in Lincoln, Neb. on October 23, 1984, by U.S. Immigration and Naturalization Service agents (INS agents). The respondents were processed in Omaha, Neb., some 60 miles from Lincoln. Processing included service of Orders to Show Cause; the orders stated a hearing would be held at a date and time "to be set." Attached to the show cause orders was a list of legal assistance available for the Omaha area.

On October 24th, they were flown 500 miles to Denver, Col. for detention prior to deportation proceedings. Neither respondent was served with notice of the date and time of their deportation hearing; they had not waived their right to the seven days notice required by 8 C.F.R. 242.1(b) (1984).

In a joint hearing on October 30, 1984, respondents and eleven other Mexicans were found deportable. None of the aliens were represented by counsel. At the hearing, both respondents requested that the Immigration Law Judge (ILJ) provide relief from the deportation order. Such relief was premised on the fact that each had continuously resided in the United States for more than seven years and had no prior criminal record. The ILJ acknowledged their eligibility to apply for suspension of deportation, but failed to act upon the requests. The ILJ signed an order finding the respondents to be deportable, and to have waived their rights to appeal. On October 31, warrants of deportation issued and respondents were bussed

to El Paso, Texas, a trip of 8-10 hours. On November 1, 1984, respondents were escorted across the border to Mexico.

2. On December 12, 1984, both respondents were arrested in Lincoln, Neb. They were indicted by the grand jury sitting in the District for Nebraska on charges of violating 8 U.S.C. § 1326.

On Feb. 7, 1985, respondents timely filed pretrial motions requesting pretrial judicial review of their deportation proceedings, and dismissal of the indictments against them. Alternatively, respondents moved to suppress and exclude all evidence relative to the deportation orders of Oct. 30, 1984. On Feb. 22, 1985, the U.S. District Court for the District of Nebraska dismissed the indictments.

The memorandum opinion supporting the dismissal order found that pretrial judicial review was available to challenge a prior administrative order that represented a material element of a criminal charge. The court noted the strong dissent by Justices Jackson and Frankfurter in *U.S.* v. *Spector*, 343 U.S. 169 (1952), which stated that an alien "[s]tands on equal constitutional footing with the citizen when he is charged with crime. If Congress can subdivide a charge against an alien and avoid just trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen." *Spector*, supra, at 178. The district court also found persuasive the reasoning of the Third, Seventh and Ninth Circuits that allowed collateral attacks on a deportation order. (Pet. App. at 18a). These circuits require that a governmental action be done according to law to be valid. They further state that, for the purposes of 8 U.S.C. § 1326, a deportation must be "a lawful deporta-

tion." *U.S.* v. *Gasca-Kraft*, 522 F.2d 149, 152 (9th Cir. 1975). See also *U.S.* v. *Bowles*, 331 F.2d 742 (3d Cir. 1964); *U.S.* v. *Rosal-Aguilar*, 652 F.2d 721, 723 (7th Cir. 1981).

The district court then found that after reviewing respondents' deportation proceedings, it was "left with the distinct impression that substantial justice was not done." (Pet. App. at 26a). In a detailed factual finding, Judge Urbom stated that the respondents had been denied due process by the ILJ's failure to provide a hearing that was fundamentally fair. It was "inconceivable that they [the respondents] would so lightly waive their rights to appeal, and thus to the relief they now claim entitlement, if they had been fully apprised to the ramifications of such a choice." (Pet. App. at 23a) The swift expulsion of the respondents from this country following their hearing barred any further appeals, even though they were still well within the ten days allowed to appeal the administrative order. Expulsion also interrupted "their prior continuous stay in the United States so as to make them seemingly now ineligible for suspension of deportation." (Pet. App. at 24a)

The district court stated that it "reviewed the tape recording of the hearing held before the Immigration Law Judge on October 30, 1984. In addition, I have compared the hearing tape with the unofficial transcript provided by defense counsel." (Pet. App. at 19a) The tapes were stipulated into the record, and available to this court for review. (D.Ct. Record, filing no. 22) They were not transcribed. The unofficial transcript was an appendix to the brief in support of the motions, and was not made a part of the record.

3. The court of appeals affirmed, stating that "[A]llowing a pretrial review of the underlying deporta-

tion to examine whether due process was provided ensures fundamental fairness to the rights of the criminal defendant." *United States* v. *Mendoza-Lopez*, 781 F.2d 111, (8th Cir. 1985). The opinion specifically found that *Lewis* v. *United States*, 445 U.S. 55 (1980) was inapplicable to the facts at hand. The prior decision in Lewis which that defendant sought to collaterally attack was judicial, not administrative. The court of appeals further found that the district court had correctly ruled that the ILJ did not clearly or adequately inform the respondents of the consequences of the choices they were forced into making. A dissent was entered by Judge Fagg, stating his belief that 8 U.S.C. § 1105A provides the "sole and exclusive" method for obtaining judicial review of deportation orders.

SUMMARY OF ARGUMENT

Essential to the principle of fundamental fairness is the right to due process of law, particularly where loss of liberty is at stake. The facts of this case clearly establish that the Immigration and Naturalization Service (hereinafter I.N.S.) ran roughshod over the respondents' rights, ignoring not only fundamental fairness in its deportation procedures, but also its own regulations of notice and relief. The culmination of this gross miscarriage of justice was the I.N.S.'s swift expulsion of the respondents from this country, well within their time to appeal. The issue of whether the respondents could still challenge the 1984 deportation through the appropriate civil channels is not an issue in this criminal case. Whether the I.N.S. can insulate its actions from any judicial review of its administrative orders by its own bad acts is the question raised in this matter.

1. The lower courts were correct in allowing pretrial scrutiny of the administrative deportation order and in

finding the respondents were materially harmed by due process violations in their deportation. Judicial review of the proceedings underlying the order of deportation provides for a proper balancing of individual and governmental interests. It provides the least intrusive forum for protecting these interests, while preserving the constitutional integrity of the § 1326 proceedings. Prior unreviewed administrative orders should not be deemed conclusive upon the jury in a criminal trial. *U.S.* v. *Spector*, 343 U.S. 169, 179 (1952) (Jackson J., dissenting.)

2. Collateral attack in a Section 1326 prosecution does not provide another avenue for appeals by aliens seeking delay of their deportation orders. It is beyond question that the only persons who would have standing to utilize it would be aliens who had actually departed pursuant to an order of deportation. The effect of the review also does not set aside the deportation, except for purposes of criminal prosecution for illegal reentry.

The facts of this case demonstrate why collateral attack should and must be available to prevent a grave injustice. It is inequitable to exempt civil deportation hearings from the strict due process requirements of criminal prosecutions and then permit the government to "turn around and use the result as a conclusive determination of [deportability] in a criminal proceeding." *Spector* at 179.

3. An administrative ruling should not be allowed to supercede the right of the jury to determine all elements of a criminal offense. In *Estep* v. *U.S.*, 327 U.S. 114 (1964), this Court held that the validity of an administrative order could be reviewed when the order became the foundation for a criminal charge. To deny such a review would be to deny the defendant the opportunity to prove the nonexistence of an essential element of the crime with which he

was charged. See also *McKart* v. *U.S.*, 395 U.S. 185 (1969).

4. Analysis of 8 U.S.C. § 1326 and its legislative history indicates Congress intended to allow collateral attacks. The Congressional record and legislative history of Section 1326 is examined in detail in the *Amicus Curiae* briefs.

The purpose in enacting 8 U.S.C. § 1105(a) was to consolidate review of deportation orders in a single forum. It also was hoped it would abbreviate the process of judicial review, and frustrate dilatory tactics to delay departures of aliens ordered deported. *Cheng Fan Kwok* v. *I.N.S.*, 392 U.S. 206 (1968). Such a policy is not applicable to persons charged under § 1326, who have already departed.

ARGUMENT

A DEPORTATION ORDER NOT PREVIOUSLY SUBJECTED TO JUDICIAL REVIEW CAN BE COLLATERALLY ATTACKED IN A 8 U.S.C. § 1326 PROSECUTION. THE REVIEW IS TO DETERMINE WHETHER THE ORDER WAS ENTERED IN ACCORDANCE WITH DUE PROCESS AND WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Collateral Attack Of The Underlying Deportation Order Is Essential To Protect The Constitutionality Of Criminal Proceedings Under Section 1326.

Possible constitutional infirmities arise if Section 1326 is interpreted to bar the trial court from examining the validity of the deportation. There is unfairness in exempting deportation hearings from the strict due process requirements of criminal prosecutions because of their civil nature, while allowing the government to,

> "turn around and use the result as a conclusive determination of [deportability] in a criminal proceeding."

U.S. v. *Spector*, 343 U.S. 169, 179 (1952) (Jackson J., dissenting)

It is undisputed that deportations are civil in nature, and the various protections that trigger in a criminal context are inapplicable. *I.N.S.* v. *Lopez-Mendoza*, 468 U.S. ____, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984). Unlike the criminal standard of proof a deportation hearing requires only that deportability be "found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true." 8 C.F.R. § 242.14 (1984).

As occurred in this case, allowing a pretrial review of the underlying deportation insured fundamental fairness to the criminal defendants. Here, the respondents were initially arrested and ultimately expelled from the country within a seven day period. They also had no notice of the deportation hearing which was held 500 miles from their homes. When they sought discretionary relief, their requests were met with laughter, and they were bussed off to the border. The record also shows that both respondents were unfamiliar with the legal process, and unrepresented by counsel. (D.Ct. Record, no. 22, cassette recordings).

The facts of this case graphically illustrate the necessity for permitting review of the underlying deportation order. In *Estep* v. *U.S.*, 327 U.S. 114 (1946), this Court allowed examination of an underlying administrative order for procedural violations, stating, "[w]e cannot believe that Congress intended that criminal sanctions were to be applied . . . no matter how flagrantly they violated the rules and regulations which define their jurisdiction." *Estep.* at 119. *Estep* is applicable to the facts herein because there are no other avenues of relief for the respondents. All avenues were closed within 48 hours of

their deportation when they were escorted across the border. 8 U.S.C. § 1105a(c)

Support for allowing a collateral attack of an administrative order is also found in *McKart* v. *U.S.*, 395 U.S. 185, 197 (1969). Although not expressly permitted by statute, a judicial review was ruled to be an appropriate balancing of individual and governmental interests.

Yakus v. *U.S.*, 321 U.S. 414 (1944), another war time case, is distinguishable from the present case. It involves an exercise of rulemaking power, not the adjudicative powers of the I.N.S. Therefore, a different scope of review mandated by the due process clause applies. *Yakus*-type determinations are akin to delegated legislative authority, and are subject only to an examination for constitutionality. A deportation hearing, by its judical nature, is measured against procedural safeguards for the equitable treatment of individuals. Furthermore, respondents herein did not challenge the constitutionality of the law itself; the challenge was to the procedure of their deportation, which was in contravention to the I.N.S.'s own regulations.

Petitioner asserts that *Lewis* v. *U.S.*, 445 U.S. 55 (1980) forecloses objections of constitutionality in this matter. The district court did not find *Lewis* controlling for several reasons. One, the policies behind the two criminal statutes are vastly disparate. Secondly, *Lewis* involved a prior judicial proceeding with the higher burden of proof accorded a criminal proceeding.

Whether an administrative decision can be attacked collaterally when the decision becomes a material element in a criminal proceeding under Section 1326 has varied drastically from circuit to circuit. The court of appeals documented this split in its opinion. (Pet. App. at 3a-4a)

The differences in view appears to center on a presumption in the Third, Ninth, Seventh and Eighth Circuits that an act of a governmental agency should be in accordance with the law. The expectation that a deportation order be lawful if it is to form the basis for criminal sanctions avoids potential constitutional problems. As reasoned in *U.S.* v. *Bowles*, 331 F.2d 742 (3d Cir. 1964),

> "Back of a deportation lies the deportation warrant and back of the warrant lies an order of deportation which in turn is bottomed upon a deportation hearing held in accordance with law." *Bowles* at 749.

See also *U.S.* v. *Rosal-Aguilar*, 652 F.2d 721, 723 (7th Cir. 1981); *U.S.* v. *Gasca-Kraft*, 522 F.2d 149, 152 (9th Cir. 1975).

Spearheading those circuits that have rejected the doctrine of collateral attack (Second, Fifth, and Tenth) is the case of *U.S.* v. *Gonzalez-Parra*, 438 F.2d 694 (5th Cir. 1971). This case held that re-litigation of the merits of a deportation hearing is barred by Section 1105a, and that a defendant who fails to pursue the statutory administrative remedies cannot later challenge the order in a Section 1326 proceeding. Such a reading of Section 1326 would have had unconscionable results if applied to this case. The respondents' inability to understand the consequences of their choices, including their need to appeal, were found to have caused them substantial harm. This finding was upheld by the Eighth Circuit Court of Appeals (Pet. App. at 4a)

It is important to note that permitting a review of the deportation order is just the threshold step for the movant-defendant. It must also be shown that a violation of constitutional rights occurred. Here, the district court found that there was a serious question as to whether the

respondents were adequately heard, or whether they understood the consequences of their choices. Judicial review provided a proper balancing of individual and governmental interests under the Constitution. The alien would only receive one judicial review of the deportation, which imposes only a minimal burden on the I.N.S. and courts. Preclusion of the review in a Section 1326 prosecution "may result in an unjustified prison term of two years, a result that offends fundamental fairness." "Collateral Attacks on Deportation Orders," 50 BROOKLYN L. REV. 721 (Spring, 1984)

B. Judicial Review To Ascertain Whether A Deportation Order Is Supported By Substantial Evidence, And Entered In Accordance With Due Process, Is Consistent With The Immigration Code.

The legislative history of 8 U.S.C. § 1326 reveals no bar to a collateral attack on the lawfulness of a deportation order. The House and Conference Report, a document of some one hundred odd pages, contained the following reference to Section 1326: "criminal sanctions are provided for entry of an alien at an improper time or place, for misrepresentation and concealment of facts, *for reentry of certain deported aliens . . .*" *Immigration and Nationality Act*, H.R. No. 1365, 82nd Cong., 2d Sess., U.S. Code Cong. and Admin. News, p. 1653 (1952) (emphasis added). While it is true that the House Report printed Section 1326 in a column next to one of its predecessors, 8 U.S.C. (1942) § 180, this only further contrasts the differences in the two laws. Section 180 contained the criminal provision for reentry after a deportation pursuant to law; Section 180 also contained several other sections concerning alien seamen and voluntary departures. H. R. Rep. 1365, 82nd Cong., 2d Sess. 219-220 (1952).

While Section 1326 makes it clear that unauthorized reentry was punishable as a crime, it is not clear that the deportation order can be "unlawful" for the purposes of the act. It is unlikely Congress intended to allow a constitutionally tainted administrative order to be unchallengable in a later criminal action. Furthermore, Congress is bound by the Constitution. The Fifth Amendment provides that "no *person* shall . . . be deprived of life, liberty, or property, without due process of law . . ." (Emphasis added). This encompasses all persons, including all aliens. *Plyler* v. *Doe*, 457 U.S. 202, 210 (1982); *Wong Wing* v. *U.S.*, 163 U.S. 228, 238 (1896). Despite petitioner's contentions about *Yakus* and *Lewis*, it is inconceivable a U.S. citizen, faced with a similar unjust administrative order, would be barred from having that order examined minimally for procedural due process in a later criminal sanction.

Troubling questions also arise whenever an issue is removed from the consideration of the jury. The Sixth Amendment right to a jury is even further compromised if that administrative order has never been judicially reviewed.

8 U.S.C. § 1105a was intended to unify the procedures for appealing deportation decisions. Its language shows that due process considerations were a factor in its conception. Its legislative history indicates its main purpose was to reduce dilatory appeals by persons ordered deported who wanted their departure delayed. Any defendant in a Section 1326 prosecution is going to fall outside of that purpose, as they will have had to leave to reenter. Section 1252 is the civil deportation proceeding statute. Criminal sanctions are not its primary purpose.

The scope of the collateral attack/judical review in Section 1105a differs from the level at judicial review con-

ducted in this case. A successful attack of a deportation order under Section 1105a would affect the actual deportation order, either by remand or dismissal. Some affirmative relief would be granted the alien who had remained within the U.S. borders.

The only result of the successful collateral attack in the present case was dismissal of the criminal indictments. Respondents still have a deportation on their immigration records which would require a waiver by the Attorney General. A new tactic in delaying actual deportation has not been created. The "sole and exclusive" provision has not been violated.

The district court reviewed the deportation proceedings for violations of procedural due process. This was done pursuant to defense motions to judically review, or, alternatively, to suppress the orders which were entered in contravention of respondents' due process rights. A *de novo* review of the facts was not requested or ruled on by the lower courts. A procedural review of the underlying order is clearly allowed in criminal litigation under a motion to exclude and suppress. Under the facts of this case, barring such a review would raise serious constitutional questions. The district court found that the respondents had demonstrated a "substantial likelihood that the result of the [deportation] hearing would have been materially affected," had the ILJ fully complied with the provisions of 8 C.F.R. § 242.17 (Pet. App. at 25a). The court also found that the swift execution of the warrant of deportation also affected respondents right to file for suspension of deportation or to appeal the order. Specifically, the court found that "the tape recording of the deportation hearing itself demonstrates amply that these defendants did not understand the consequences of the choices they were forced to make (Pet. App. at 25a) and

that "substantially justice was not done." (Pet. App. at 25a). Under the government's restrictive interpretation of § 1326, this limited judicial review would have been unavailable. A gross miscarriage of justice has been avoided by the district court's interpretation, and the Court of Appeals affirmance of the district court's order.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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